

SAN CARLOS APACHE TRIBE
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-38-A

Decided September 21, 1989

Appeal from a decision of the Acting Phoenix Area Director, Bureau of Indian Affairs, disapproving a lease of tribal land to the Bureau for the use of the San Carlos Agency.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs:
Administrative Appeals: Leases--Indians: Lands: Fair Rental
Value--Indians: Leases and Permits: Rental Rates

25 CFR 162.5(b) (2) vests the Secretary with discretion to approve the lease of tribal land to the Bureau of Indian Affairs, inter alia, at a nominal rental. In light of this regulatory provision, the decision whether the Bureau should pay fair market value to lease tribal land is committed to the Bureau's discretion. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant San Carlos Apache Tribe (tribe) challenges a December 21, 1987, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), disapproving a lease of tribal land to BIA for the use of the San Carlos Agency. The proposed lease provided that BIA would pay rental at fair market value. For the reasons discussed below, the Board affirms that decision.

Background

On March 19, 1987, the Superintendent, San Carlos Agency, wrote to the tribe requesting that it execute a lease to BIA for 20 sites occupied by BIA facilities on the San Carlos Apache Reservation. The letter states in part:

In 1983 we requested a long term lease from the Tribe for 18 tracts totaling 243.76 acres. The Tribe requested an appraisal for the tracts; this was obtained and provided in 1983 to the Tribe. At that time the 18 tracts were appraised at \$31,325.00 market rental. With the transfer of several government quarters to the Tribe the surveys have been revised and we are now requesting 20 tracts totaling 219.881 acres. We do not have funding to pay the market rental. Program services would have to be reduced by a like amount if this approach were to be taken and I would not recommend this be done. Regulations contained in 25 CFR Part 162 - Leasing and Permitting provide for nominal rent for Federal Agencies. We feel a long term lease for a minimal or even token amount is appropriate since the facilities involved have been built with money appropriated by the U.S. Congress over the years for the benefit of the San Carlos Apaches. No cost has been incurred by the Tribe and the land area involved has never been in demand by the Tribal government for governmental purposes. Approval of a lease will solidify our physical arrangements and lay to rest any speculation about the appropriateness of the Bureau continuing to occupy buildings on the reservation and continuing to spend Federal dollars to maintain and improve these buildings.

On September 1, 1987, the tribal council adopted Resolution 87-118, providing in part:

The San Carlos Apache Tribal Council hereby authorizes the approval of a lease to the Bureau of Indian Affairs for sites located at San Carlos, Point of Pines, other mountain top lookouts and radio facility sites, for Bureau use and occupancy for a twenty five (25) year term with an option to renew for an additional twenty five years. This lease will have a breakin provision at the end of each five (5) year period so that an updated appraisal may be obtained. Such an appraisal will provide for increased lease payments of, at not less than published Cost Price Index (C.P.I.). The first five (5) years of this lease will be at the Bureau of Indian Affairs' 1983 appraisal rate of \$31,325 per year, or the new revised appraisal rate schedule if higher (within 90 days).

By memorandum of September 21, 1987, to the Area Director, the Superintendent recommended approval of a lease providing for payment of fair market value rental to the tribe. The Superintendent stated: "In this era of tribal governments being encouraged to expand and exercise their governmental duties and responsibilities in all areas, including

taxation and other revenue generating activities, we feel it is appropriate to lease at fair market value."

In a December 21, 1987, memorandum to the Superintendent, the Area Director disapproved the lease, stating in part:

We have reviewed the documents you have submitted and find them in order. However, we disagree with the intent of the contract as being contrary to the policy of the Bureau of Indian Affairs. As a service organization, we feel it is not in keeping with the nature of our organization to provide the San Carlos Apache Tribe financial consideration for the location of facilities which house programs designed to assist the tribe and tribal members. Even if we agreed to the intent of the lease, and we do not, the payment of such consideration would be deducted from the overall funding provided to your agency which would limit the ability of the agency to provide necessary services to the tribe to which they are entitled.

In view the above, we hereby disapprove the subject lease and recommend that you approach the tribe for a lease of the subject lands for a nominal value.

By letter of December 28, 1987, the Superintendent notified the tribe of the disapproval. The tribe appealed, and its appeal was still pending in the Washington, D.C., office of BIA on March 13, 1989, the date new appeal regulations for BIA and the Board took effect. ^{1/} The appeal was transferred to the Board on May 1, 1989, for consideration under the new procedures.

The Board issued a notice of docketing on May 8, 1989, and established a briefing schedule. No briefs have been filed.

Discussion and Conclusions

In its appeal, the tribe states that its present policy is to require that all lessees of tribal land pay rental of fair market value. It states that several of its present lessees paying fair market value are service organizations which provide services to tribal members. These agencies include the Arizona Department of Economic Security and the San Carlos Apache Cattle Association.

The tribe also argues that the Federal policy encouraging tribal self-sufficiency and self-determination supports the tribe's right to require that BIA pay fair market value for tribal land without reducing the tribe's other Federal entitlements. It states that it believes BIA pays fair market value in other locations around the country and notes that, although BIA

^{1/} See 54 FR 6478 and 6483 (Feb. 10, 1989).

stresses the importance of obtaining fair market value for leases of tribal land to others, it does not want to be subject to the same policy.

25 CFR 162.5(b) provides in relevant part:

Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair market value.

* * * * *

(2) In the discretion of the Secretary, tribal land may be leased at a nominal rental for religious, educational, recreational, or other public purposes to religious organizations or to agencies of Federal, State, or local governments; for purposes of subsidization for the benefit of the tribe; and for homesite purposes to tribal members provided the land is not commercial or industrial in character.

This provision authorizes, but does not require, the lease of tribal land to BIA at a nominal rental. In this case, the Area Director determined that, as a matter of policy, BIA should not pay fair market value for a lease of tribal land. The tribe, of course, is not required to grant the lease at all. See, e.g., 25 U.S.C. § 476 (1982). 2/

[1] The determination whether to approve a lease of tribal land for a nominal rental under 25 CFR 162.5(b)(2) is committed to the discretion of BIA. Conversely, where rental at nominal value is authorized by regulation, as it is in this case, the determination whether BIA should pay fair market value for a lease of tribal land is also committed to BIA's discretion. In this case, the Area Director's determination depended in part on BIA's evaluation of whether payment of fair market value for the lease would inappropriately diminish the funds available for programs and services to the tribe.

In reviewing such discretionary decisions, it is not the function of the Board to substitute its judgment for BIA's. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion. In this case, BIA committed no legal errors. The decision reached by the Area Director was within the limits of his discretion.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the

2/ 25 U.S.C. § 476 (1982) provides in relevant part:

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: * * * to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe."

December 21, 1987, decision of the Acting Phoenix Area Director is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge